United States Court of Appeals for the Second Circuit



APPELLEE'S BRIEF

75-1100

To be argued by Michael S. Devorkin

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1100

UNITED STATES OF AMERICA.

Appellee,

---V.---

STEVEN POND and DAVID G. FANELLI,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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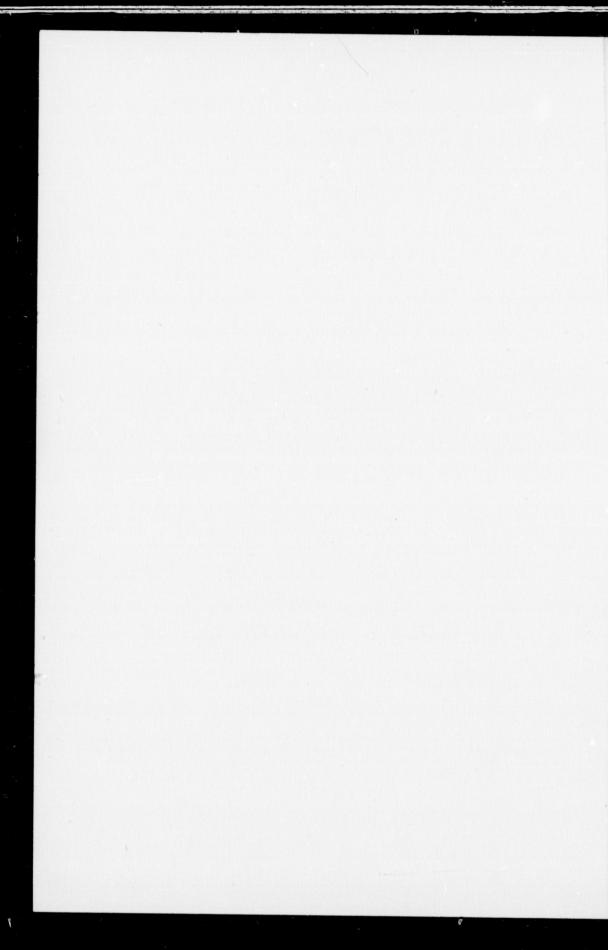


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United States Court of Appeals FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA.

Appellee.

v.

STEVEN POND AND DAVID G. FANELLI,

Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Steven Pond and David G. Fanelli appeal from judgments of conviction entered on February 27, 1975, in the United States District Court for the Southern District of New York upon pleas on guilty entered before the Honorable Lawrence W. Pierce, United States District Judge, which pleas preserved their right to appeal Judge Pierce's order denying a motion to suppress evidence.

Indictment 73 Cr. 1145, filed on December 21, 1973, charged both defendants in Count One with conspiracy to violate federal narcotics laws in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(B), and in Count Two with distributing and possessing with intent to distribute approximately 77 pounds of marijuana.

The defendants moved to suppress 3 pieces of luggage containing large quantities of marijuana which were seized from them pursuant to a search warrant issued by a Magistrate on December 6, 1973. Judge Pierce conducted hearings on the suppression motions on May 30, June 4-6 and June 13 and 14, 1974. In an opinion filed on September 30, 1974, 382 F. Supp. 556 (S.D.N.Y.), the District Court denied the motions with respect to the suitcases specified in the warrant and granted the motions with respect to a third suitcase.

On December 30, 1974, and January 13, 1975, Fanelli and Pond respectively pleaded guilty to Count One of the indictment on the condition that 1) appeals from the denial of the motions to suppress could be taken; 2) the pleas could be withdrawn and the case would go to trial if the appeals were successful; and 3) if the appeal were unsuccessful, the plea of guilty would stand and the Government would dismiss Count 2.*

Fanelli was sentenced to a term of six months imprisonment, followed by eighteen months probation and a special parole term of two years. Pond was sentenced to a term of two years as a young adult offender pursuant to 18 U.S.C. §§ 4209 and 5010(d). Both defendants are at liberty pending this appeal.

^{*}Such a plea and appeal is consistent with this Court's decision in *United States* v. Faruolo, 506 F.2d 490, 491 n.2 (2d Cir. 1974).

Statement of Facts

On December 6, 1974, an arrest warrant was issued for one Bill Pond and a search warrant was issued for a bluegrey suitcase and a footlocker in his possession. The warrants were issued upon the affidavit of George Sweikert, a Special Agent for the Drug Enforcement Administration (DEA), which was based, in large part, upon information which Special Agent Ed McCravy of the San Diego, California office of DEA had received from an unnamed informant.*

Agent Sweikert stated in his affidavit that the informant had provided 1) a detailed physical description of an Amtrak train passenger named Bill Pond; ** 2) a precise description of the luggage carried by Pond, including its appearance, weight and baggage number; *** and 3) passenger Pond's travel itinerary from San Diego to New York. **** The informant allegedly asserted he had smelled

^{*} The entire affidavit of Agent Sweikert comprises footnote 1 to Judge Pierce's Memorandum Opinion. 382 F. Supp. at 558.

^{**} The affidavit described Pond as "white male, approximately 25 years of age, 6'1", weighing approximately 200 pounds, long blond hair, having a beard. At the time of boarding the train he was described as wearing denim pants, green pullover shirt, brown jacket and moccasin type shoes." (Aff. ¶ 4).

^{***} The affidavit stated that "the marijuana was carried aboard said train in a blue gray suitcase and a footlocker bearing pschedelic (sic) colors or symbols, and weighing approximately 50 and 35 pounds respectively." (Aff. ¶ 2). It also stated that "said Bill Pond checked the said two pieces of luggage and was given baggage tags Nos. 977-017 and 977-018 for the footlocker and suitcase respectively." (Aff. ¶ 5).

^{****} The affidavit said that Pond checked the baggage aboard "AMTRAK Train #40 (The Broadway Limited) at San Diego bound for Penn Station, New York, New York, (via Chicago, Illinois) scheduled to arrive here on Friday, 12-7-73 at 10 a.m." (Aff. ¶1). The "baggage was checked aboard said train at the San Diego Amtrak office on 12-4-73 by . . . POND." (Aff. ¶3).

the aroma of marijuana coming from the baggage, and because of that, together with his experience and other indicators, he concluded a "large amount of marijuana is being transported on said train." ($\P 7$).

Agent Sweikert in the affidavit informed the Magistrate that the informant had proven himself reliable in the past "based upon approximately 40 cases leading to over 70 arrests and an aggregate recovery of marijuana in excess of 2000 pounds" and that his "acute sense of smell" had been "invariably accurate in the past detection of marijuana in similar circumstances." (Aff. § 6). The affidavit further specified that the informant had "detected marijuana under similar circumstances about five weeks ago, and that among his many instances of detection there was one seizure of over 120 pounds of marijuana at Penn Station, New York City within the past year that was contained in a footlocker and a suitcase under similar conditions as those here." (Aff. §6). The agent also related that in his experience San Diego is a convenient transfer point for smugglers of marijuana from Mexico.

Armed with a search warrant and a warrant for Pond's arrest, DEA agents went to Penn Station in New York City, and before Pond came to claim his luggage, executed the warrant and opened the footlocker. Pond was then observed meeting co-defendant Fanelli, who helped him claim the two pieces of baggage and remove them from the train station. At that time both were arrested. The two bags and a third maroon case carried from the train by Pond were seized and later opened, and each were found to contain a large number of bricks of marijuana.

Shortly after the suppression hearing commenced, Judge Pierce found the affidavit "legally sufficient on its face to support a finding of probable cause for the issuance of the search warrant." 382 F. Supp. at 558-59. Nevertheless, he also permitted the defendants to attack the accuracy of the

affidavit's statements without requring them to make an initial showing of falsehood or other imposition on the Magistrate. 382 F. Supp. at 559.

Thereafter, Agent McCravy testified that he could not recall the informant basing his conclusion in this case about marijuana in the baggage on the disproportionate ratio of baggage weight to size, as indicated in the affidavit. Judge Pierce, however, concluded that the misrepresentation in the affidavit was unintentional and "at the most it was negligently made." (Id.). In all other respects, he found that there were no misrepresentations in the affidavit. Finally, Judge Pierce concluded that this single misrepresentation was not material because "under the circumstances of this case and given the informant's prior experience and record of performance, the sense of smell was sufficient to make the necessary probable cause finding." Therefore, the search warrant was found to Id. at 560. valid, and the motion to suppress was denied in all respects, except that the maroon suitcase, not specified in the warrant but seized at the time of arrest, was suppressed on the theory that the contraband contained therein was not in "plain view."

ARGUMENT

The District Lourt properly denied the motions to suppress the marijuana found in the footlocker and suitcase.

Appellants contend that the District Court erred in finding that a misstatement contained in the affidavit supporting the search warrant was not intentional and not material. They also claim that the affidavit absent the misstatement fails to establish probable cause for the search because it did not set forth facts to corroborate independently the reliability of the informant's sense of smell or his report that marijuana was present. Neither argument has any substance.

A. The Misstatement

The existence of a misstatement of fact in an affidavit supporting a search warrant does not invalidate the warrant unless it is established that the inaccuracy was (1) intentional and (2) material. See United States v. Gonzales, 488 F.2d 833, 837 (2d Cir. 1973); see also United States v. La Vecchia, Dkt. No. 74-2272 (2d Cir., April 4, 1975), slip op. 2741 at 2753.

After hearing the evidence, Judge Pierce found that the affidavit in this case contained a single misstatement of fact in that the informant had not based his conclusion that marijuana was being transported on the "disproportionate ratio of baggage size to weight" as alleged in paragraph 7 of the affidavit. The District Court found that there was "no evidence that the misrepresentation was intentional. On the contrary, I find that at most it was negligently made." 382 F. Supp. 556.

Both Agent Sweikert, who signed the affidavit, and Agent McCrayy, who supplied Sweikert with the information obtained by the informant, testified at the suppression hearing. Whether the misstatement in the affidavit was intentional or innocent was entirely an issue of credibility "which the district court, who saw and heard the witnesses, resolved in favor of the agents." United States v. Faruolo, supra, 506 F.2d at 493; United States v. Fernandez, 456 F.2d 638, 640 (2d Cir. 1972). United States v. Miley, Dkt. No. 74-2207 (2d Cir., March 19, 1975) slip op. 2363 at 2384. On this appeal, Pond and Fanelli have failed to demonstrate, as they must, that Judge Pierce's finding on the issue of intentionality was clearly erroneous. United States v. Gunn, 428 F.2d 1057, 1060 (5th Cir. 1970). United States v. Montos, 421 F.2d 215, 219 n.1 (5th Cir.), cert. denied, 397 U.S. 1022 (1970); United States v. Jones, 475 F.2d 723, 728 (5th Cir.), cert. denied, 414 U.S. 841 (1973); United States v. Mathis, 298 F.2d 790 (6th Cir.), cert. denied, 370 947 (1962); United States v. Gantner, 436 F.2d 364, 368 (7th Cir. 1970); United States v. Hall, 488 F.2d 193, 198 (9th Cir. 1973); United States v. Lindsay, 506 F.2d 166, 170 (D.C. Cir. 1974).

At the hearing below, Agent McCravy testified that Charles Dunbar, the general manager of the Amtrak station in San Diego, who the record reveals was the informant in this case, had told him "that the luggage did emit an odor of marijuana." (Tr. 24). Although Dunbar "did mention the weight" of the luggage to McCravy, he did not describe the weight "as being particularly unusual," (Tr. 24). Agent McCravy did testify, however, that the disproportionate weight of the baggage is frequently a factor in marijuana cases. (Tr. 24). While the record fails to indicate whether it was McCravy or Sweikert who was the source of the statement about the disproportionate weight of the luggage here, the only sensible explanation is that one of them during the course of their telephone communications amalgamated Dunbar's report of his observations and perceptions in the present case with previous experiences in similar cases. There is nothing in the record that establishes that the erroneous statement was intentionally made or that Judge Pierce's finding to the contrary was clearly erroneous. This Court's observation in La Vecchia is fully apposite here:

The district court noted that there was no showing that the false statement was made intentionally. Indeed, in light of all the other facts detailed in the four-page affidavit there was certainly no reason for the agent to make any false statement in this one minor respect, slip op. at 2753 n.8.

The claim that there are other inaccuracies in the affidavit is not supported by the record. Except for the statement about the disproportionate weight of the luggage, appellants have not shown that Agent McCravy retreated

from his testimony that Sweikert's affidavit correctly reported the information that McCravy had transmitted. (Tr. 14).

The other discrepancies which appellants purport to find are either non-existent or are, at most, picayune. Thus, the affidavit states that the informant had proved reliable in "approximately 40 cases." (Aff. 95). At the hearing seven months later, McCrayy, who had not reviewed the case files involving Dunbar before he testified, said that on a "conservative basis" and as "an approximation" he had "personally worked with him [Dunbar] in about 25 or 30 cases. (Tr. 29). Appellants, quite understandably, have not been able to cite any authority which purports to discern a legally significant distinction between the affidavit and the testimony on this point. Similarly, the affidavit did not allege that all of the informant's prior cases involved smell, but only that when smell had been relied upon, it had been "invariably accurate." (Aff. ¶6). Far from contradicting the affidavit, McCravy's testimony merely elaborated that in approximately half these cases, smell was a determining clue. (Tr. More important, however, McCravy unequivocally testified that in every case where the informant had said that baggage contained marijuana, McCravy's investigation confirmed that the information was correct. (Tr. 101).*

^{*} Appellants place great emphasis on the fact that Sweikert's notes did not include all the information contained in the affidavit. The point is singularly unimpressive. McCravy not only confirmed the accuracy of the affidavit except for the single erroneous statement, but also testified that he supplied other information to Sweikert not reflected in the affidavit which the record reveals was of significance. (Tr. 103-04). In any event, what is important to an Assistant United States Attorney who supervises the preparation of a search warrant application is not necessarily significant to an agent who in obtaining the information quickly may jot down only those items he believes he might forget.

Judge Pierce also concluded that the erroneous statement in Sweikert's affidavit was not material:

- ... The pivotal issue in this case is whether the misrepresentation or the misstatement in the affidavit was 'material', that is, whether it was of such a nature that were it not found in the affidavit, no finding of probable cause could be made and the warrant could not have been issued.
- [1] I find that the affidavit supports a finding of probable cause absent the allegation as to the ratio between the baggage weight and size. In this Court's view, under the circumstances of this case and given the informant's prior experience and record of performance, the sense of smell was sufficient to make the necessary probable cause finding. I therefore find that the misrepresentation was not material. . . . 352 F. Supp. at 560.

As we demonstrate below, the District Court was entirely correct in finding that the affidavit established probable cause without consideration of the erroneous statement, which, therefore, was not material. Accordingly, the warrant must be sustained. United States v. Gonzales, supra; United States v. La Vecchia, supra; see United States v. Harwood, 470 F.2d 322, 325 (10th Cir. 1972).

B. There was probable cause to support the warrant even without the misstatement.

Under Aguilar v. Texas, 378 U.S. 108 (1964), and Spinelli v. United States, 393 U.S. 416 (1969), a supporting affidavit for a search warrant that relies on hearsay information from an unidentified informant must show that (1) the informant was in fact a reliable person, and (2) that the underlying circumstances by which he obtained his information were such that the information was probably accurate. United States v. Canieso, 470 F.2d 1224, 1229

(2d Cir. 1972); United States v. Anderson, 500 F.2d 1311, 1315 (5th Cir. 1974). In sum, the magistrate must have a "'substantial basis'" for crediting the hearsay. United States v. Harris, 403 U.S. 573, 581 (1971).* Such a "basis" unquestionably exists in this case, even apart from the misstatement.

Sweikert's affidavit clearly satisfied the requirement that the informant was reliable. The recitation that the informant had previously provided reliable information which had resulted in arrests and seizures of large quantities of marijuana was alone sufficient to establish the informant's reliability and to justify reliance on his story. States v. Sultan, 463 F.2d 1066, 1069 (2d Cir. 1972); United States v. Perry, 380 F.2d 356, 358 (2d Cir.), cert. denied, 389 U.S. 943 (1967); United States v. Vigo, 357 F. Supp. 1360, 1364 (S.D.N.Y. 1972), rev'd in part on other grounds, 487 F.2d 295 (2d Cir. 1973). Moreover, the affidavit recited that the informant had accurately smelled marijuana under similar circumstances, including two instances that Sweikert described in some detail. no requirement, as appellants suggest, that the informant must be shown to be reliable in the past under circumstances

^{*}We note, however, as Judge Friendly recently pointed out in *United States* v. *Burke*, Dkt. No. 75-1021 (2d Cir., May 15, 1975), slip op. 3571 at 3575, that "the question of the precise standing of *Spinelli* after *Harris* v. *United States*, 403 U.S. 573, 581-83 (1971) . . ." is not free from doubt.

Burke also is pertinent here because it holds that the Aguilar-Spinelli analysis is inapplicable to situations where the informant upon whose information the affidavit relies is an "alleged victim of or witness to a crime." Id. Although the affidavit in the present case did not identify the unnamed informant as a witness to the crime, we submit that the magistrate could reasonably have inferred that fact (which the hearing later disclosed) from the unusual wealth of detail in the affidavit concerning the baggage, the baggage receipt numbers and Pond's itinerary which the informant had supplied. So construed, the affidavit plainly satisfies the requirements of Burke and the cases cited therein at slip op. 3575-3577.

identical to those described in the affidavit which give rise to the application for the warrant. It is more than sufficient if, as here, he has been shown to be reliable in circumstances involving similar criminal activity.

The affidavit challenged here also satisfied the second prong of the *Aguilar-Spinelli test*. The statement "[T]hat the source is certain he has detected the aroma of marijuana emanating from the aforementioned luggage" (Aff. ¶7) plainly entitled the magistrate to conclude that the informant had personally smelled the contraband and was not relying on second or third hand information as to the existence of the aroma.

Appellants do not appear to dispute that marijuana has a distinctive, pungent and unmistakable odor. (Tr. 26-27). See also, e.g., United States v. Blair, 366 F. Supp. 1036, 1040 (S.D.N.Y. 1973). Here, moreover, the magistrate was advised that the informant "had an acute sense of smell which has been invariably accurate in the past detection of marijuana in similar circumstances as those at present." (Aff. ¶6). The affidavit further stated that the informant had "detected marijuana under similar circumstances" five weeks earlier and "that among his many instances of detection there was one seizure of over 120 pounds of marijuana at Penn Station, N.Y.C. . . . " Id. These facts fully justified the conclusion that the informant determined that he had smelled marijuana (and not some other substance) inside Pond's luggage based upon his prior experience of smelling marijuana which "invariably" had been proven accurate. This, we submit, was an adequate recitation of the underlying circumstances from which the informant derived his conclusion about the existence of marijuana in the luggage.

Moreover, the affidavit in this case was unusually precise and detailed with respect to the informant's knowledge and observations* of Pond and his activities, which also served to reinforce and confirm the reliability of his olfactory perception of the existence of marijuana. *Cf. United States* v. *Canieso*, *supra*, 470 F.2d at 1229; *United States* v. *Soyka*, 394 F.2d 443, 453 (2d Cir. 1968) (*en banc*), *cert. denied*, 393 U.S. 1095 (1969).

On this appeal appellants continue to press the contention advanced below that accurate detection through smell of narcotics, without more, is insufficient to support the issuance of a search warrant. Judge Pierce, we submit, was absolutely correct in rejecting this argument, 382 F. Supp. at 560-61. See Johnson v. United States, 333 U.S. 11, 13 (1948); United States v. Lewis, 392 F.2d 377, 378-79 (2d Cir.), cert. denied, 393 U.S. 891 (1968).

Four circuits have held that detecting the odor of marijuana is a sufficient underlying basis alone to establish probable cause, even for a warrantless search. United States v. Laird, 511 F.2d 1039, 1040 (9th Cir. 1975); United States v. Campos, 471 F.2d 296 (9th Cir. 1972); Fernandez v. United States, 321 F.2d 283, 286-87 (9th Cir. 1963); United States v. Bowan, 487 F.2d 1229, 1230-31 (10th Cir. 1973); United States v. Valen, 479 F.2d 467, 469-71 (3d Cir. 1973), cert. denied, 419 U.S. 901 (1974); see Miller v. Sigler, 353 F.2d 424 (8th Cir. 1965), cert. denied, 384 U.S. 980 (1966).

Since probable cause to justify a search warrant is less than what is required without a warrant, *Miller* v. *Sigler*, supra, 353 F.2d at 427, where as here, the agents have obtained the approval of a judicial officer, the acceptance of smell alone to establish probable cause is even more compelling. See United States v. Kaplan, 89 F.2d 869, 871

^{*}E.g. the physical description of Pond, his travel itinerary, the baggage receipt numbers, and the physical description of the baggage.

(2d Cir. 1937); *United States* v. *Reille*, 39 F. Supp. 21, 22 (E.D.N.Y. 1941).

While it is true that in some of the above cited cases the affiants who had detected the aroma were law enforcement agents, the report of the smell of marijuana by a private airport employee has been held sufficient to constitute probable cause for a warrantless search. United States v. Valen, supra. In any event a magistrate ordinarily would not have to test a law enforcement officer's competence to detect the particular aroma in question. Miller v. Sigler, supra.

Although Johnson v. United States, supra, and United States v. Lewis, supra were premised upon the affiant being the person who presumably had smelled the odors and who had appeared before the magistrate, the affidavit here is not invalid because it is based upon hearsay report of the informant. As the Supreme Court has held, since "hearsay alone does not render an affidavit insufficient, the Commissioner need not have required informants or their affidavits to be produced, . . . so long as there was a substantial basis for crediting the hearsay." Jones v. United States, 362 U.S. 257, 272 (1960).

Here, Judge Pierce properly found that such a "substantial basis" existed because the magistrate was advised of the informant's acute sense of smell and the reliability thereof under similar circumstances in past cases, including two specific instances where his competence had been demonstrated. In addition, he had provided detailed information about Pond, his baggage and his present travel plans. All of these factors compel a finding that the hearsay information was probably accurate and should be credited. See United States v. Harris, supra. The District Judge was entirely correct in his conclusion:

Given the fact that in this case the informant was about 3,000 miles away and that the train was

due to arrive the next day, this Court deems the information given sufficient to support the issuance of the warrant. 382 F. Supp. at 561.

The Supreme Court has held that an affidavit supporting a search warrant is to be interpreted in a "common sense" and not a hypertechnical manner, and in a close case any doubt must be resolved in favor of upholding the warrant. United States v. Ventresca, 380 U.S. 102, 109 (1965); United States v. Harris, supra, 403 U.S. at 577. Judge Lumbard further explained this principle in United States v. Lewis, supra, 392 F.2d at 379, where he said: "One of the best ways to foster increased use of warrants is to give law enforcement officials the assurance that when a warrant is obtained in a close case, its validity will be upheld." Application of this principle here requires that the warrant be sustained.

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)) ss.:
COUNTY OF NEW YORK) Michael S Devorkin being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York. That are the 2d day of June 1975
he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:
1. John D. Jessep, Esq. Koskoff, Koskoff, Rutkin & Bieder
1241 Main Street Bridgeport, Connecticut 06604
2. William J. Gallagher, Esq. The Legal Aid Society Federal Defender Services Unt 509 U.S. Courthouse Foley Square New York, New York 10007 And deponent further says that he sealed the said envelope and
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Sworn to before me this
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